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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 605

THE BEACON JOURNAL PUBLISHING COMPANY,
Petitioner,

vs.

AKRON TYPOGRAPHICAL UNION NO. 182,

and

AKRON STEREOTYPERS and ELECTROTYPERS UNION NO. 37, INTERNATIONAL STEREOTYPERS and ELECTROTYPERS UNION OF NORTH AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion and order of the U.S. Sixth Circuit Court of Appeals are set forth in Petitioner's Appendix (Appendix A, A1-A2).

The United States District Court for the Northern District of Ohio, Eastern Division, issued its Memorandum adopted as Findings of Fact and Conclusions of Law on May 21, 1968, and is set forth completely in Petitioner's Appendix (Appendix B, A3-A19).

On January 4, 1966, Respondent, Akron Typographical Union No. 182, formally notified Petitioner of the existence of a dispute concerning the method of computation of the Christmas bonus (Respondent's Appendix A).

On March 7, 1966, Respondent, Akron Stereotypers and Electrotypers Union No. 37, I.S.&E.U., similarly formally notified Petitioner of the existence of a similar dispute (Respondent's Appendix B).

Petitioner, since on or about the stated dates, and at all times material hereto, has refused to process and if need be arbitrate the grievance. (See stipulation, Petitioner's Appendix C, paragraph numbered 5.)

The contractual language applicable to the present case is set forth in Petitioner's Appendix (Petitioner's Appendix D). (See also Memorandum of Judge Kalbfleisch, Petitioner's Appendix B.)

The above, Respondents believe, represents a factual statement of the case and it is only because we cannot accept certain presumptions and conclusions contained in Petitioner's "Statement of Facts" that it is believed necessary to here set forth the factual situation.

ARGUMENT AND LAW

I

The Processing of Grievances under a Collective Bargaining Agreement Is an Integral Part of the Collective Bargaining Process.

Collective bargaining, as it has developed under the National Labor Relations Act, in most cases involves much more than the negotiation of increases in wage rates. The typical collective bargaining agreement covering an industrial plant has been aptly described by Archibald Cox:

> "No state or federal statute, except possibly the tax laws, covers as wide a variety of subjects or impinges upon as many aspects of the ordinary company's business or a worker's life—wages, hours of employment, working conditions, health and accident insurance, retirement, pensions, promotions, layoffs, discipline, subcontracting, technological changes, work loads, and a host of minor items." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1490 (1959).

Or, as this Court described the agreement, in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960), "a collective bargaining agreement is an effort to erect a system of industrial self-government."

This self-government has two interrelated aspects. The first is legislative—the enactment through collective bargaining of the basic code of rules to govern the relationship between employer and employee. Typically, this code is adopted for a fixed period of years. Its termination date, unlike the termination date of an instrument of commerce, is not the end of the relationship but the agreed upon time for the negotiation of amendments to the code.

The second aspect is administrative and judicial. Obviously, the collective bargaining agreement like any stat-

ute covering so much in so few words, requires interpretation and application. And this is supplied by the grievance procedure.

The agreement, of course, is actually administered by the employer, not by the union or by the employees. Joint administration is rare, if not non-existent, in the American experience. It is management's job to recruit and hire employees, to train them, to schedule the work, to assign workers to jobs, to transfer and promote employees, to pay the wages and determine the appropriate rate of pay, to lay off workers and to recall them when business picks up, and to discharge them or relieve them from work. In these actions, and all of the others which comprise the management of the enterprise, the employer is the actor and the director. The agreement guides his actions, but it is the employer who makes the decisions in the first instance. See Davey, Contemporary Collective Bargaining (1959), p. 113.

The machinery by which those actions are tested and by which, through such testing, specific content is given to the rules expressed by the agreement is the grievance procedure. The employer acts. If an employee believes that the action is contrary to the agreement, he grieves. "The processing of disputes through the grievance procedure is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960).

Grievance procedures follow a fairly uniform pattern. The first step is usually a conference between the aggrieved employee and his foreman, sometimes with and sometimes without a union representative present. Subsequent steps usually involve a series of meetings between union and employer representatives, at increasingly higher levels of au-

thority. If the matter cannot be settled at any of these steps, the union typically has the right to refer the dispute to binding arbitration.

The existence of these steps and the function they perform are of the utmost importance for this case. The steps are not merely formalities, or delaying devices. The fact that they exist almost uniformly in collective bargaining agreements is testimony that all parties regard them as significant and important parts of the system.

The function of the steps is to resolve, through analysis, review and bargaining, as many grievances as possible without arbitration. It is essential to the process that this be done. And the extent to which it is done is, in large measure, an indication of the health of the system of self-government. Indeed, one of the persistent problems faced by collective bargaining in the United States is to isolate and remedy the causes of "distressed" grievance procedures. As Arthur Ross, former Director of the Institute of Industrial Relations, University of California and more recently United States Commissioner of Labor Statistics, wrote in 1959:

> "There is no doubt that some parties arbitrate too much. They arbitrate chronically and promiscuously. Arbitration becomes a mill, rather than a court of last resort, a substitute for the grievance procedure rather than a means of strengthening it."[1]

Where this happens, as appears to be the case under the National Railroad Adjustment Board, the consequence is not only delay but a failure of the procedure and of the

1. Ross, "The Role of the Law in Arbitration: A Panel Discussion." Arbitration and the Law, Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators (BNA, 1959), p. 72. See also Ross, "Distressed Grievance Procedures and Their Rehabilitation," Labor Arbitration and Industrial Change, Proceedings of the Sixteenth Annual meeting, National Academy of Arbitrators (BNA, 1963), p. 104.

ultimate arbitration itself to fulfill its function of interpreting the agreement and settling disputes. See Mangum, Railroad Grievance Procedures, 15 Industrial and Labor Relations Review 474, 498 (1962).[2]

The grievance procedure, then, is an extension of the bargaining process. The agreement itself establishes the broad rules. As cases develop, it is the function of the grievance procedure to develop and implement the rules through the settlement of cases, by agreement where possible and by arbitration if agreement is impossible. As one authority has described it:

> "The grievance procedure is really a conference technique by which two parties agree on how a rule (which both accept) should be applied in a particular situation." Chamberlain, Labor (1958), 238.
>
> "The significance of this . . . procedure can hardly be overstressed. It is one of the truly great accomplishments of American industrial relations. For all of its defects—the bypassing of some of the appeals stages, its use by the union as a political device to convince the employees that it is looking out for their interests the slowness with which it sometimes operates—it constitutes a social invention of great importance." Id. at 240.

The system works only where each party makes an effort to maximize the number of cases settled by agreement and to minimize the number of cases settled by arbitration.

Grievances, of course, are of all sorts. Some involve the simplest of factual disputes. Others involve complex calculations of rates of pay, as under incentive plans. Some involve only the interests of the grievant. Others may in-

2. In the First Division, covering operating employees, the average time for processing a grievance through the arbitration proceedings of the Board is about six years (one or two years for processing on the properties plus between four and five years for processing by the Board). Id. at 494.

volve conflicts between employees. Almost every seniority grievance, for example, involves a claim that the grievant, rather than some other employee, should have been promoted to a particular job, or retained at the time of layoff or recalled to work when the level of operations increased. Still others involve the interpretation of general or ambiguous language in the agreement and their disposition will settle not only the particular case but the meaning of the contractual provision for the future.

Whatever the nature of the grievance, however, both the union and the employer have a vital interest in utilizing the grievance procedure, to the maximum extent possible, as a settlement machinery. The interests of the employees as a group, which the union represents, demand a course of conduct other than blind and undeviating pursuit of every individual's claim. Insistence upon a literal interpretation of language which produces an absurd result may be the way to maximize the interests of a particular grievant, but "next week, when the union pleads for common sense in handling another grievance, its words will be thrown back in its face." Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 608 (1956). On the other hand, if a union shows a willingness to drop frivolous grievances and compromise doubtful ones, the employer will be inclined to be equally accommodating. Finally, of course, unless both sides make a sincere effort to use the grievance steps for the purpose of settling grievances, rather than as mere way stations on the road to arbitration, the procedure itself will break down.

II

The Impact of Prior Decisions on the Issue Before This Honorable Court.

The Supreme Court of the United States has considered the issue raised in this case many times. To trace the

present day thinking of the Supreme Court one has to travel back no further than the case of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, where the Court held that a grievance arbitration provision in a collective agreement could be enforced by reason of Sec. 301 (a) of the Labor-Management Relations Act. In that case the Court determined that the federal policy was to promote industrial stabilization through the collective bargaining agreement and that complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the "quid pro quo" for the agreement not to strike (*Textile Workers* v. *Lincoln Mills*, supra).

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it:

> ". . . It is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages.

> "Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words." (Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-1499 (1959).)

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship, they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather, it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, supra, at 1005. Gaps may be left to be filled in by reference to the practices of

the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." Shulman, supra, at 1016.

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the compe-

tence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

It is submitted that the case at bar clearly involves a dispute with a very clear and concise portion of the contract at issue as well as a practice which has been in existence nearly thirty (30) years.

On June 20, 1960, the Supreme Court handed down decisions in three cases which should be clearly dispositive of the instant controversy. One of them has been drawn upon heavily by the author of this memorandum. (Reference is made to the cases of *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574; and, *United Steelworkers*

of America v. *Enterprise Wheel and Car Corporation*, 363 U.S. 593.)

In the instant case the Union has said, in effect, that the Company has violated a specific portion of the labor agreement as well as a custom and practice of long standing.

It cannot be argued, with any degree of sincerity, that the parties have agreed to allow the courts to interpret and apply the provisions of the labor agreement but yet the Company is doing exactly this and have frustrated the Union's every attempt to bring this matter before the proper tribunal, i.e., a panel of arbitrators.

In the case of *Steelworkers* v. *Warrior & Gulf Navigation Co.* (supra), the Supreme Court of the United States said:

> "Yet to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Emphasis supplied).

In the case of *Steelworkers* v. *Warrior & Gulf Navigation Co.* (supra), the Court had this to say:

> "In the absence of any expressed provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, *the exclusion clause is vague and the arbitration clause quite broad.* Since any attempt by a court to infer such a purpose necessarily comprehends the

merits, *the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.*" (Emphasis supplied).

The Petitioner in its brief has blithely ignored the full import of the Steelworkers Trilogy of cases by excerpting one sentence which inferentially supports its position.

There can be little doubt that the case of *Harris Structural Steel Co.* v. *United Steelworkers*, 298 F.2d 363 (1962), cert. den. 369 U.S. 851, bears almost directly on point.

The defendant would have the Court believe that the Union has the right to strike over the matter at issue even though the Union has agreed in the labor contract to submit all disputes over the interpretation and application of the bargaining agreement, to the grievance procedure up to and including arbitration.

The Unions are attempting to meet the congressional policy and intent squarely to effectuate a peaceful resolution of the problems existing between the parties by the procedure it is attempting to follow.

Additionally, it appears to the author of this brief that, if a union and/or a company jointly provide for compulsory and binding arbitration of a dispute, it is the equivalent of a no-strike pledge concerning disputes subject to arbitration, even in the absence of an express no-strike clause. (See *Local 174, Teamsters* v. *Lucas Flour Co.*, (1962) 369 U.S. 95; *Teamsters, Local 25* v. *W. L. Mead, Inc.*, (C.A. 1, 1956) 230 F.2d 576, cert. den. 352 U.S. 802;

Mine Workers, District 50 v. *Haislip Baking Co.*, (C.A. 4, 1955) 223 F.2d 872; *Dubs Mfg. Corp.* (*Steelworkers*), 148 NLRB 1114, enf'd (C.A. 6, 1965) 52 LC 16730.)

One other decision should be brought to the attention of the Court which involves the same circumstances present in the instant controversy. It also involves the same Petitioner but different unions were parties to the dispute. It should be pointed out that there are approximately eight unions representing bargaining unit employees at the Petitioner's plant. The Christmas bonus formula was changed with respect to all of them. Four of the unions elected to file charges with the National Labor Relations Board. As a part of its order, the Board ruled that the Company, Petitioner here, must:

> ". . .; reimburse employees for loss due to revised bonus formula;. . ."
>
> (See 65 LRRM 1126; 164 NLRB No. 98.)

Petitioner would have the Court believe that because letters were given each employee from 1961 through 1965 stating, in effect, that the Christmas bonus was a gift, makes it so. These letters are nothing more than self-serving declarations.

The Respondents could not have objected through the grievance procedure for any effective relief as long as the Company continued to pay the bonus properly. A letter to the effect that the bonus came from the man in the moon would have had about the same effect, so long as the bonus was paid.

Here again, however, Petitioner is seeking the Court to substitute its judgment for that of the arbitrator.

CONCLUSION

In view of all the facts, argument and law in this case, it is respectfully submitted that the appellate and trial court's decision and order should be affirmed in all respects.

Respectfully submitted,

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RESPONDENTS' APPENDIX A

January 4, 1966

The Joint Standing Committee
Beacon Journal Publishing Company
Akron, Ohio

Gentlemen:

Pursuant to Article I, Section 10, of the current bargaining agreement between the Beacon Journal Publishing Company and the Akron Typographical Union No. 182, your Committee is hereby notified that a dispute exists between the Employer and the Union concerning the method of computation of the Christmas bonus used by the Employer to pay Christmas bonus to the members of Akron Typographical Union No. 182 for the year 1965, and protest is further made of the amount received by each member of the stated Union.

Historically, over a period of many years, the Employer has computed the Christmas bonus for members of the stated Union in accordance with a set formula which formula was not used during the computation of the 1965 Christmas bonus. The Company's unilateral action in this case constitutes a violation of the Collective Bargaining Agreement between the parties in that it violates a custom and practice in usage between the parties for so many years.

Further, the Union is of the opinion that the Company's unilateral action violates the second paragraph of the preamble of the contract between the parties in that it has changed wages and conditions of employment without negotiating same with the Union.

This action and the request is by unanimous decision of the Executive Officers of the Akron Typographical Union No. 182, and we request a meeting of the Joint Standing Committee at the earliest possible time to resolve the dispute.

Sincerely yours,

.....

Akron Typographical Union
No. 182

RESPONDENTS' APPENDIX B

March 7, 1966

The Joint Standing Committee
Beacon Journal Publishing Company
Akron, Ohio

Gentlemen:

Pursuant to Article XVI of the current bargaining agreement between the Beacon Journal Publishing Company and the Akron Stereotypers and Electrotypers Union No. 37, I.S.&E.U., your Committee is hereby notified that a dispute exists between the Employer and the Union concerning the method of computation of the Christmas bonus used by the Employer to pay Christmas bonus to the members of Akron Stereotypers and Electrotypers Union No. 37, I.S.&E.U. for the year 1965, and protest is further made of the amount received by each member of the stated Union.

Historically, over a period of many years, the Employer has computed the Christmas bonus for members of the stated Union in accordance with a set formula which formula was not used during the computation of the 1965 Christmas bonus. The Company's unilateral action in this

case constitutes a violation of the Collective Bargaining Agreement between the parties in that it violates a custom and practice in usage between the parties for so many years.

Further, the Union is of the opinion that the Company's unilateral action violates Article II, Sections A and B of the contract between the parties in that it has changed wages and conditions of employment without negotiating same with the Union.

This action and the request is by unanimous decision of the Executive Officers of the Akron Stereotypers and Electrotypers Union No. 37, I.S.&E.U., and we request a meeting of the Joint Standing Committee at the earliest possible time to resolve the dispute.

Sincerely yours,

Akron Stereotypers and Electrotypers Union No. 37, I.S.&E.U.